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To Catch a Trade Secret Thief With Forensic Neutrals

DANIEL GARRIE, ESQ.

Remediating the theft of a trade secret can be likened to a dried red wine stain on your favorite white shirt. While the stain is readily visible, removing the stain and restoring the shirt to its original condition is difficult, and sometimes impossible. Similarly, discovering the theft of a trade secret does not solve the underlying business issues created by the theft. Those business issues require the organization to identify the bad actor who stole its trade secret and then ensure all evidence of the trade secret is removed from the thief's possession. Erasing this information from an individual's or a company's system, however, is more complicated, and certainly more important, than removing that wine stain from your shirt. The answer is to retain a qualified forensic neutral as the expert stain remover.

A forensic neutral, or neutral forensic inspector, is retained by mutual agreement between the parties or appointed by a court, arbitrator or other decision-making body and mandated to carry out some action on the body's behalf. A forensic neutral is uniquely qualified by knowledge and experience to address the legal and technical issues that arise in a trade secret dispute, including determining how to best remedy the theft of the trade secret. As an attorney, a forensic neutral can help parties understand the technical requirements set forth by a protective order, draft necessary protocols and monitor compliance with a court order. As a technologist, a forensic neutral can also perform technical work.



When each party hires competing forensic experts, the processes are unnecessarily complicated, and there is a risk that these experts will act in a confrontational and biased manner, becoming little more than another attorney or advocate for one side of the dispute. In comparison, forensic neutrals are neutral; they act in the interest of both parties through the entire scope of their services. Hence, enlisting a forensic neutral removes the need to retain technical and legal experts, avoids a “battle of the experts” and shortens or eliminates the long briefing and waiting period required when bringing technical issues before the court.

In today's workplace, trade secrets are no longer printed on paper and kept in locked filing cabinets. Since cloud-based storage and distributed “personal” computing equipment are becoming

the norm in companies, proving trade secret theft now usually involves sophisticated forensic software and recovery techniques to determine the truth. For example, in a trade secret dispute involving an employer and former employee, a forensic neutral can prepare a protocol for identifying all the company's data possessed by employees and ensure compliance with the protocol. Additionally, a forensic neutral can determine the existence and veracity of digital evidence and forensically analyze deleted or corrupted data for evidence of wrongdoing. A forensic neutral can also ensure measures are applied that safeguard the confidentiality of data during the implementation of the protocol.

The Defend Trade Secrets Act (DTSA), signed into law in early May 2016, provides various situations in which a forensic neutral can significantly assist. It stipulates that the owner of a misappropriated trade secret may bring a civil action if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce. Parties can pursue damages and/or injunctive relief as remedies. In some situations, the DTSA provides for "ex parte seizure" of property, which allows the aggrieved party to ask the court to order the seizure of property "necessary to prevent the propagation or dissemination of the trade secret" without notice to the opposing party. To successfully obtain an ex parte order, a plaintiff has an exceptionally high standard that they must set out in an affidavit or verified complaint. It is in this particular regard that a forensic neutral may be critical to a plaintiff who seeks ex parte seizure or other injunctive relief. A qualified forensic neutral possesses the necessary expertise to deal with the extremely technical collections, erasures of sensitive data and buried transfers that often accompany the marshaling of facts to

prove the theft of trade secrets and the thief's likely identify.

While settlement terms or a court order may require the offending person or entity to purge all trade secret data, how can a party verify such compliance? A forensic neutral can perform such actions and ensure actual, complete and continuing compliance, which can be complicated. They validate data removal from systems and audit systems to ensure compliance with a court order or regulatory mandate. While the scope of a forensic neutral's work can vary depending on the needs of a particular case, the goal is to ensure the demands of the order are met from both a legal and technical perspective.

In conclusion, a qualified forensic neutral usually has many years of experience assisting parties in detecting and containing trade secret theft. They are highly skilled at quickly and decisively finding critical evidence, either from traditional sources, such as computer hard drives, or newer technologies, such as social media chat conversations or other similar platforms, and then explaining their findings to a factfinder. This is why it is necessary to retain the services of a qualified forensic neutral to help parties combat the trade secret theft and ameliorate the prejudice and harm resulting from that theft.

***Daniel B. Garrie** is the co-founder of Law & Forensics, a neutral with JAMS, the Editor-in-Chief of the Journal of Law and Cyber Warfare, a Lecturer in Law at the Rutgers School of Law where he teaches cyber warfare, data governance, and cybersecurity law, and a Certified Blockchain Engineer.*

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